

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

3 DR. SHIVA AYYADURAI,)
4 Plaintiff,)
5)
6 vs.)
7)
8 WILLIAM FRANCIS GALVIN,)
9 MICHELLE K. TASSINARI, DEBRA)
10 O'MALLEY, AMY COHEN, NATIONAL) No. 20-CV-11889-MLW
ASSOCIATION OF STATE ELECTION)
DIRECTORS, all in their)
individual capacities, and)
WILLIAM FRANCIS GALVIN, in his)
official capacity as the)
Secretary of the Commonwealth)
of Massachusetts, et al.,)
Defendants.)

BEFORE THE HONORABLE MARK L. WOLF
SENIOR UNITED STATES DISTRICT COURT JUDGE
SCHEDULING CONFERENCE BY VIDEOCONFERENCE

John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210

June 15, 2021
2:42 p.m.

Kathleen Mullen Silva, RPR, CRR
Official Court Reporter

John Joseph Moakley United States Courthouse
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Mechanical Steno - Computer-Aided Transcript

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 20-11889, Dr. Shiva Ayyadurai
3 v. William Francis Galvin, Michelle Tassinari, Debra O'Malley,
4 Amy Cohen and National Association of State Election Directors.
5 Participants are reminded that recording and/or rebroadcasting
6 of this hearing is prohibited and may result in sanctions.

7 THE COURT: And at the outset, let me reinforce that
8 admonition. As I said in May, after one participant improperly
9 tweeted the proceedings, I think put them on YouTube and was
10 sanctioned, it's essential that this proceeding not be recorded
11 or transmitted in any way. We have, because of the COVID-19
12 pandemic, the rare opportunity to make federal judicial
13 proceedings available to the public without requiring that they
14 come to the courtroom. This is actually something I, among
15 others, have long advocated. But last time there were close to
16 500 people watching the hearing. Today there are many dozens.
17 And for those who want to take advantage of this opportunity,
18 it's essential that they adhere to the rules.

19 I had the option today to make this proceeding
20 available only by audio, but I thought I would try once more to
21 do it by video. I expect that if our authority to permit video
22 conferences continues and there are violations of the court's
23 requirements today, I'll not authorize video for people who are
24 not parties or lawyers in the future.

25 Would counsel please identify themselves for the court

1 and for the court reporter.

2 MR. COOPER: Certainly. Good afternoon, Your Honor.
3 Howard Cooper for Dr. Shiva Ayyadurai, and I have my colleagues
4 Max Stern and Ben Wish I see on the screen, and I do see
5 Dr. Shiva on the screen as well.

6 THE COURT: Yes. And for the defendants, starting
7 with what I'll call the Galvin defendants.

8 MR. HORNSTINE: Good afternoon, Your Honor. Assistant
9 Attorney General Adam Hornstine. My pronouns are he/him/his,
10 and I'm here today on behalf of Secretary Galvin, Michelle
11 Tassinari and Debra O'Malley.

12 MS. STERMAN: Good afternoon, Your Honor. Assistant
13 Attorney General Anne Sterman on behalf of those same
14 Commonwealth defendants.

15 MR. MITCHELL: Good afternoon, Your Honor. Nolan
16 Mitchell from Quarles & Brady. I represent the National
17 Association of State Election Directors and Amy Cohen.
18 Ms. Cohen is here today, as is Keith Ingram, I-n-g-r-a-m, who
19 is the NASED representative.

20 THE COURT: Thank you. And from Twitter.

21 MS. ELLSWORTH: Good afternoon, Your Honor. Felicia
22 Ellsworth from WilmerHale on behalf of non-party Twitter. I'm
23 joined by my partners Ari Holtzblatt and Pat Carome as well
24 also on behalf of non-party Twitter.

25 THE COURT: Okay. When the May 21 -- May 20 and May

1 21 hearings ended, I stopped in part because the plaintiff, who
2 likes to be known as Dr. Shiva, expressed an interest in being
3 represented by counsel, which I encouraged because there are
4 profound legal issues, complex legal issues involved in this
5 case, and important related factual issues as well.

6 Since May 21, pursuant to my orders, all of the
7 parties reported that they did not believe that my limited
8 association with Ms. Ellsworth, counsel for Twitter, could
9 cause a reasonable person to question my impartially, and,
10 therefore, they agreed that my recusal is not required by 28
11 United States Code Section 455(a). In addition, all except the
12 plaintiff stated that they waived any Section 458 grounds
13 relating to Ms. Ellsworth for my disqualification, as they're
14 permitted to do under Section 455(e).

15 In addition, Howard Cooper, Max Stern, Benjamin Wish
16 of Todd & Weld I'm told have been retained by the plaintiff and
17 filed appearances in this case. I had discussed appointing
18 Mr. Cooper under a District of Massachusetts program that
19 allows the use of up to \$10,000 in attorney admissions funds,
20 not appropriated funds, to cover expenses. But it's my
21 understanding, and it can be clarified, that that is not now
22 necessary. Dr. Shiva has retained his present lawyers, I'm
23 told.

24 Dr. Shiva requested that I authorize hybrid
25 representation which would allow him, as well as his lawyers,

1 to address the court. The defendants objected, and in my June
2 order, docket 135, I noted that I have the discretion to
3 allow hybrid representation. It's usually not appropriate, but
4 I would consider requests by the plaintiff to speak -- requests
5 made by his lawyers for him to speak on a case-by-case basis.

6 Also, since May 21, the Galvin defendants filed a
7 memorandum, as I encouraged, concerning the motion to dismiss,
8 their motion to dismiss, based on the 11th Amendment in
9 addressing the *Ex Parte Young* exception to what would otherwise
10 be an 11th Amendment bar to jurisdiction. I've also received
11 additional requests to participate from potential amici,
12 including from the Children's Health Defense organization,
13 which address, among other things, issues raised by Twitter's
14 forum selection clause defense.

15 As I ordered the parties, and Twitter conferred, the
16 plaintiff proposed an agenda for today. The defendants and
17 Twitter responded. As I understand it, there's some areas of
18 agreement and some disagreements. And in my view, much, if not
19 all, of this is organic.

20 So I think it may be most effective if I tell you what
21 my present thinking is on the issues that you've raised as I
22 understand them and my tentative view as to how to proceed from
23 here, and then you'll all have an opportunity -- all the
24 lawyers will have an opportunity to address it.

25 So unless there have been some material developments

1 since the recent reports -- well, let me ask this: Have there
2 been any material developments since the recent reports,
3 Mr. Cooper?

4 MR. COOPER: No, Your Honor.

5 THE COURT: All right. And -- all right. I assume
6 there haven't. So here's my understanding based on your
7 reports and my thoughts about how to proceed, my tentative
8 thoughts. The plaintiff requests 30 days, until July 15, to
9 file a revised second amended complaint. The parties and
10 Twitter agree that would be appropriate. Putting aside the
11 timing for the moment, I agree that would be desirable too.
12 And when I say "timing" I'd like to put proceedings on a
13 schedule that we can have another up to two days perhaps of
14 hearings in mid to late August, ideally.

15 The plaintiff needs to decide whether to reallege
16 certain -- the plaintiffs should decide whether to reallege
17 certain claims that I indicated I was likely to dismiss. And
18 some of this I'm doing because Mr. Cooper and his colleagues
19 have to catch a moving train, and some of these things were
20 discussed at length for two days in May. But in May I
21 expressed the tentative view that the claim against Amy Cohen
22 of NASED in her individual capacity for damages would probably
23 be dismissed based on what I had been presented with.

24 I think there's a good discussion of what I understand
25 the applicable standards to be in Judge Saylor's decision in

1 M-R Logistics, 537 F.Supp. 2d 269 to -- I'm sorry -- 537
2 F.Supp. 2d 269, 279 to 281. Basically, as I understand it, and
3 this wasn't briefed or briefed well by the plaintiff when he
4 was pro se, when a person acts for an organization without any
5 potential benefit for herself, she can't be held individually
6 liable and ordered to pay money damages if the claim is
7 meritorious.

8 So if the revised second amended complaint, or
9 proposed second amended complaint includes a claim against Amy
10 Cohen in her individual capacity, unless I change my mind,
11 consider yourself ordered to file a memorandum that addresses
12 the bases for that claim under Federal Rule of Civil Procedure
13 11 and the applicable law. And that's a memo that will need to
14 be filed with the second amended complaint to expedite
15 resolution of this issue and some other issues that I intend to
16 direct the plaintiff to brief with the revised second amended
17 complaint.

18 I also stated in May that I thought the claims for
19 money damages against the defendants in their personal
20 capacities should be dismissed because they were protected by
21 qualified immunity. And if the plaintiff realleges these
22 claims, which the defendants ask be dismissed now, but if the
23 plaintiff realleges these claims, they too shall be addressed
24 in the memo, and I mentioned in May what I understand to be the
25 applicable standards for qualified immunity. I discussed them

1 in detail in 2014 at *Campos v. Van Ness*, 52 F. Supp 3d 240 at
2 249 to 250, where I discussed the then recent Supreme Court
3 decision in *Plumhoff*, 572 U.S. 765 at 779.

4 I saw in the report that the plaintiff essentially
5 needed more time to decide whether to reallege certain claims,
6 and if the defendant -- if the plaintiff decides not to
7 reallege these claims against defendants in their personal
8 individual capacities, it won't be necessary for me to decide
9 the motion to dismiss if I allow the amendment. And, you know,
10 also facilitate focus on, you know, the issues that are
11 fundamental to the case, the merits, rather than the remedies.

12 The plaintiff wants to propound discovery requests to
13 the parties and Twitter by July 15, 2021 targeted to the
14 exception to the 11th Amendment bar on jurisdiction created by
15 the Supreme Court or recognized by the Supreme Court in *Ex*
16 *Parte Young*. The issues, as I understand them, are whether any
17 of Twitter's alleged conduct is fairly attributable to the
18 government, and if so, whether it is continuing. I believe it
19 would be useful for the plaintiff -- it would facilitate the
20 progress of the case if the plaintiff did describe what
21 discovery it is requesting or propounding. However, at the
22 moment I don't believe that the defendants or Twitter should be
23 required to respond to any requests for discovery until I
24 decide the foreseeable oppositions to a motion to amend or
25 motions to dismiss.

1 One of the things I wanted to discuss today is whether
2 I ought to allow the proposed amendment with regard to the
3 current defendants at least and possibly with regard to
4 Twitter, and then deal with issues like futility on motions to
5 dismiss.

6 This is something that at the moment is of particular
7 importance, and I discussed this on May 21, but it's something
8 I think the parties can address somewhat today but need to be
9 prepared to address. And this is reflected on pages 11 to 14
10 of the May 21 transcript.

11 I'll speak of the defendants, including -- NASED is
12 Galvin for these purposes. It's my understanding that if
13 Galvin makes a facial or sufficiency challenge to the revised
14 proposed second amended complaint, I would treat that
15 essentially as a Rule 12(b) (6) motion and decide if the
16 plaintiffs have made a plausible claim that the *Ex Parte Young*
17 exception applies. And Galvin made such a facial or
18 sufficiency challenge to the pro se proposed second amended
19 complaint, and it is addressed in the submission Galvin made
20 since May 21.

21 Galvin also made a factual challenge to the pro se
22 proposed second amended complaint. For a factual challenge
23 that is not intertwined with the merits of the case, I would
24 allow discovery and then decide if the plaintiff has proven
25 that this court has jurisdiction under the *Ex Parte Young*

1 exception. This was discussed by the First Circuit in
2 *Valentin*, 254 F.3d 358 to 363. However, where the
3 jurisdictional facts are intertwined with the facts central to
4 the merits of the case and the motion to dismiss survives
5 facial challenge, as I understand it, it is appropriate to deny
6 the motion to dismiss without prejudice with regard to
7 jurisdiction, and then to decide that issue after discovery
8 either on a motion for summary judgment or, if there are
9 disputed material facts, at trial. This, as I pointed out in
10 May, is footnote 3 in *Valentin* 254 F.3d at 363. It's also a
11 matter that's well discussed by the First Circuit at *Kerns*, 585
12 F.3d 187 at 193. It's discussed in *Wright & Miller* as well.

13 At the moment I believe that the issues of
14 jurisdiction and the merits of this case are intertwined
15 because the plaintiff is seeking restoration of his Twitter
16 account. To prevail on the merits, the plaintiff will have to
17 prove Twitter's ongoing conduct is fairly attributable to the
18 government and would violate the First Amendment if the
19 government engaged in that conduct alone. If this is proven,
20 the *Ex Parte Young* exception applies and the 11th Amendment
21 would bar the suit.

22 So it seems to me at the moment that if the revised
23 proposed second amended complaint plausibly alleges this, I
24 would deny the motion to dismiss without prejudice. But this
25 is not an issue that the plaintiff should address in the memo

1 filed because the defendants have raised this issue and all I
2 have is the pro se pleadings of Dr. Shiva.

3 It's possible, I note, and some of the case law
4 recognizes, it's possible that there will be grounds other than
5 on the 11th Amendment to deny a motion to amend or allow a
6 motion to dismiss that would moot the 11th Amendment issue, but
7 with regard to the Galvin defendants, at the moment those
8 possible grounds don't come to mind. Twitter has -- but in any
9 event, it seems to me it would be most sensible for the
10 defendants and Twitter to see the proposed revised second
11 amended complaint and to raise whatever arguments they want to
12 raise, but not to try to solve any of them before then. I'm
13 not sure anybody is asking me to resolve any of them before
14 then.

15 There are some issues with regard to Twitter that
16 weren't briefed or fully discussed on May 20 and 21. I think
17 they're the following: There's the question under Rule 19(a)
18 of whether Twitter is a necessary party. Twitter asserts that
19 under the forum selection clause in its user agreement it must
20 be sued in the Northern District of California. It can't be
21 sued in the District of Massachusetts. There may be a question
22 of whether that forum selection clause is generally
23 enforceable, or enforceable on the facts of this case, whatever
24 they are. And I didn't see any -- I didn't discern from the
25 plaintiff's report that he was prepared to address Twitter's

1 forum selection clause. And Twitter also asserts that as a
2 non-party, which it is, at least at the moment, any subpoena
3 for discovery must be issued by the District Court in the
4 Northern District of California and any litigation concerning
5 it must be conducted there.

6 If Twitter is a necessary party and cannot be sued in
7 the District of Massachusetts, I would have to decide if
8 Twitter is an indispensable party under Rule 19(b). Twitter
9 might not be necessary or indispensable if an injunction
10 against Galvin would apply to Twitter because it is proven to
11 be working in concert with Galvin and his agent NASED.

12 If Twitter is a necessary and indispensable party, but
13 cannot be sued in Massachusetts, I might be required to dismiss
14 this case. However, if doing so would deprive the plaintiff of
15 his opportunity to litigate his claims, to have his day in
16 court, I could conclude that the forum selection clause is not
17 enforceable in this case because it would not be in the
18 interests of justice to enforce it. This is an issue discussed
19 in the Children's Health Defense proposed amicus brief, which I
20 haven't studied, but I've looked at. It addresses, among other
21 things, whether Galvin could be sued in the Northern District
22 of California, which is something that I think was briefly
23 discussed in May.

24 So the plaintiff's memo filed with the second amended
25 complaint should, at least in a preliminary way should

1 address -- well, it would address this issue too, because I
2 don't have anything helpful yet from the plaintiff pro se.

3 So that's my present tentative thinking as to how we
4 should proceed, and I'm interesting in hearing from the parties
5 and Twitter about this. Mr. Cooper, would you like to go
6 first?

7 MR. COOPER: Certainly, Your Honor. Let me just make
8 sure you can see me on the screen, because there's a variety of
9 people and I want to make sure --

10 THE COURT: Well, I'm going to go on speaker view so I
11 can see you.

12 MR. COOPER: Thank you, Your Honor. First, just
13 quickly on the administrative type matters. There is no
14 objection with regard to Ms. Ellsworth at all, and we are
15 appearing on a retained basis with regard to the cases
16 presenting significant and important constitutional issues
17 which require, frankly, that matters be brought, briefed and
18 argued in a fashion that will be appropriate for you to decide
19 them.

20 We have proposed three things, Your Honor, in our
21 proposed agenda. The first is, as you said, we would have
22 until July 15 to file a proposed second amended complaint. In
23 doing so, that will afford us time not just for the lawyers to
24 parse the various issues that you've described, Judge Wolf, but
25 also to make sure that our very sophisticated client

1 appreciates and agrees with the manner in which we are looking
2 into each of these issues.

3 I can tell the court today that we have under
4 consideration each and every one of the issues that the court
5 has identified both today and in transcripts from May 20 and
6 21, as well as going back to last October. And our goal would
7 be to, frankly, add some facts that have been brought to the
8 court's attention by Dr. Shiva that have come out in response
9 to the court's questioning, but I'll sort of focus laser-like
10 on the First Amendment and *Ex Parte Young* issues.

11 We do think, and we have proposed, at least as we can
12 make a judgment today, that there is targeted discovery that
13 would be useful to have, and we would seek a way of limited
14 30(b) (6) depositions of the Galvin defendants, the NASED
15 defendants, although I'll say that singularly, NASED,
16 Ms. Cohen, and then ultimately Twitter, whether by way of being
17 joined as a party in the proposed second amended complaint or
18 having a subpoena duces tecum and deposition subpoena served
19 upon them.

20 The discovery we would seek, Your Honor, would go
21 directly to understanding the facts behind the trusted partner
22 relationship, understanding the facts, which I think are
23 critical, with regard to the game plan book, both versions that
24 Dr. Shiva mentioned during the May hearings, and --

25 THE COURT: I'm sorry. Would you say that again,

1 please. You faded out on me.

2 MR. COOPER: Yes. Your Honor may recall that
3 Dr. Shiva brought to the court's attention what he referred to
4 as the game plan or the game books.

5 THE COURT: The play book.

6 MR. COOPER: The play book, Your Honor. Which
7 seemingly have contributions, if one can adjudge by the list of
8 contributors, not just from the defendants and their various
9 organizations but also legal counsel. And I won't go into
10 them, but Dr. Shiva began articulating certain arguments that
11 could be gleaned from some of the diagrams and stages in terms
12 of identifying important influencers and what should happen to
13 them going forward.

14 So --

15 THE COURT: I'm sorry. Go ahead.

16 MR. COOPER: So I'm just identifying, Your Honor, some
17 of the topics we would seek to --

18 THE COURT: Well, let me tell you why I said that I
19 thought it would be valuable if you identified the discovery
20 you would be seeking if you're permitted to have discovery.
21 But why -- well, maybe I misunderstood this, because you don't
22 intend to propound the discovery until after you file the
23 proposed amended complaint; is that right?

24 MR. COOPER: Yes, Your Honor, and that would lead to
25 the third thing that we're seeking, which would be an

1 opportunity, and to do so quickly, to supplement Dr. Shiva's
2 briefing based upon the discovery, to the extent necessary,
3 and, frankly, to address certain issues that he has yet to
4 address.

5 Let me just point out, Your Honor, one of the reasons
6 we proposed proceeding this way as opposed to just filing a
7 more detailed second amended complaint, and I say this with the
8 admission that I am still working through the pleadings and the
9 hearing transcripts, but it does appear that the ground in
10 terms of the defendant's positions has shifted incrementally
11 and repeatedly as additional facts have been disclosed. And
12 the broad statement from the defendants in their initial
13 motions that Twitter was exercising independent judgment, no
14 input whatsoever except the ordinary access to the portal
15 afforded all citizens by Twitter, has come to be -- let me just
16 say it needs to be understood in a far more detailed factual
17 context.

18 THE COURT: Here's part of my thinking on why
19 discovery starting at the time you file the proposed amended
20 complaint would be premature and possibly both distracting and
21 confusing. If -- so you're new to this case. Of course it's
22 been going on for a while. But if we were starting from
23 scratch and you were Dr. Shiva's lawyer, you would not get
24 discovery before you filed your complaint. You'd have to have
25 a proper basis for your allegations under Rule 11. You have

1 some prior proceedings, including some prior testimony, that
2 helps you. I mean, it gives you more information than you
3 would have had if this case were really just starting now. And
4 that -- you know, it's reasonable to require that you rely on
5 the information that exists in amending the complaint.

6 With regard to jurisdiction, and this is why I said I
7 viewed the issues as organic, if my tentative view that the
8 questions relating to *Ex Parte Young* are intertwined with the
9 merits of the case are correct, then I'm not going to be
10 considering any of the discovery in determining whether there's
11 an 11th Amendment bar to jurisdiction at this stage. I'm going
12 to be using the 12(b) (6) standard in deciding whether you
13 plausibly alleged a claim on the merits and, therefore,
14 plausibly allege an *Ex Parte Young* exception to the usual 11th
15 Amendment bar.

16 If I were to consider discovery, you know, facts
17 outside -- facts that usually can't be considered or
18 information that can't properly be considered on a 12(b) (6)
19 motion to dismiss, then you would get discovery, and then I
20 would have a hearing and I would decide by a preponderance of
21 the evidence whether you had proven jurisdiction. But because
22 I view these as intertwined, I don't at this point, subject to
23 hearing further from the defendants and Twitter, expect to be
24 doing that, plan to be doing that.

25 MR. COOPER: Let me address that, Your Honor. I agree

1 completely with the court's statement that if we were starting
2 from scratch Dr. Shiva would assemble his complaint based upon
3 what he knew and then it would be tested under the plausibility
4 standard.

5 As I understand the record, at least as far as I've
6 got into it, at some point in this process, not only initially
7 because it was a TRO hearing, did the court take testimony,
8 which is available to us, but both Twitter offered affidavits
9 as I believe did NASED. It made those part of the record on
10 the point as to -- or on the factual basis as to how the
11 complaint was made, how it was received at Twitter, most
12 importantly the purported independence of Twitter in the
13 decisionmaking.

14 And having placed those facts at issue, Your Honor, I
15 assume that Dr. Shiva, of course as of today, in my view, based
16 upon what I know, would have a good faith basis for pleading
17 that all of the requirements to establish the relationship
18 between the state actors and Twitter are sufficient to get over
19 the plausibility standard. But if the defendants are going to
20 respond to a second amended complaint seeking dismissal, making
21 a representation to the court that Twitter exercised fully
22 independent judgment, with the intent to put the affidavits,
23 including the corrected affidavit, back in front of the court,
24 we're going to have a factual inquiry.

25 THE COURT: Well, but that's my point. And as I

1 always tell my law clerks, you know, the essence of good
2 lawyering is defining the questions. And the essence of good
3 judging is having good law clerks.

4 I've come to the understanding of the relevant
5 questions that I've just explained to you. And if that view
6 holds, I'll be considering whether the jurisdictional issue is
7 intertwined with the merits of the case, and if that's correct,
8 I won't be considering anything but your proposed revised
9 second amended complaint in the documents that one can -- you
10 know, documents that are referenced in the complaint, documents
11 whose authenticity is not disputed.

12 But, you know, you said "if." In my current
13 conception, I won't be considering those affidavits, and, you
14 know, one of them was corrected, and Dr. Shiva raised questions
15 about others, you know, whether some review had been conducted
16 I think by some committee in 18 minutes when he got his last
17 three strikes, if I remember right. You know, there are
18 factual issues in all of this, but the question is the time.

19 I have a pragmatic concern as well, and that is, you
20 know, in my present conception you would file on July 15.
21 Under the local rules the defendants and Twitter would be
22 required to respond in 14 days. You might want to reply. I
23 might give you seven days or something to do that. Then I've
24 got to work on it. And I've told you I'd like to have a
25 further hearing in this matter mid to late August, hopefully

1 without destroying anybody's vacation. But I don't know that
2 it would be reasonable to require the defendants to be
3 responding to discovery. It's probably going to be irrelevant
4 to -- well, in my current view, it would be irrelevant to the
5 motions to dismiss, and time-consuming and distracting.

6 If they prevail on their motion to dismiss -- and I'm
7 entirely open-minded on all of this. I just need it, as you
8 recognized, properly briefed so the adversary process could
9 facilitate an informed decision. If I dismiss the case, then
10 there's not going to be any discovery. If I don't dismiss the
11 case, then there will be discovery. And the same discovery
12 will be central to the jurisdictional defense, 11th Amendment,
13 and to the merits of the case.

14 Part of the reason I'd like to make sure this proceeds
15 as -- you know, in a fair but efficient manner, is that if
16 Dr. Shiva has a meritorious claim, which is a big "if" -- it's
17 an open question -- he's being irreparably harmed. It's
18 axiomatic. The violation of the First Amendment rights is a
19 matter of irreparable harm, *Elrod v. Burns* and other cases.
20 So, anyway, that's my thinking.

21 Do you have -- and I'm interested in hearing from the
22 defendants and Twitter too. Do you have a -- as I said -- we
23 didn't discuss this virtually at all in May, but there's a, I
24 think, complex set of questions about whether Twitter can and
25 should be made a party to this case and required to litigate it

1 in Massachusetts. And that needs to be briefed for the
2 plaintiff too. Have you given that some thought?

3 MR. COOPER: We are actively thinking that through,
4 Your Honor, and I recognize the court's comments about the
5 ability to issue an injunction of the Galvin defendants and
6 those acting in concert with him. But I don't have an answer
7 for you on that today.

8 THE COURT: No. And I don't have an answer for you on
9 that today too.

10 I said, as I recall, and I've been doing many things
11 since the last hearings, but, you know, I raised the question
12 whether Twitter would like to be in this case here so it could
13 present its views and I could consider them if -- and it's just
14 an if -- I made decisions that were adverse to Twitter or its
15 interests, it would have standing to appeal.

16 And I looked at this fairly closely, but, as I recall,
17 Twitter -- well, Twitter -- that didn't appeal to Twitter
18 immediately, and they had some points, you know, on why they
19 couldn't get a Rule 65(b) --

20 MR. COOPER: Your Honor, let me complicate matters
21 further by saying in light of the ongoing irreparable harm to
22 Dr. Shiva from being banned from Twitter, we are also
23 considering whether at the time we file our second amended
24 complaint we're going to seek a preliminary injunction.

25 THE COURT: That doesn't surprise me. For a

1 combination of reasons -- if you file a motion for preliminary
2 injunction, then there's going to have to be a response and a
3 reply. For a combination of reasons, although it may change
4 and the reasons aren't all vacation, I may not be available
5 from essentially the end of this month until the middle of
6 August. So, you know, you'll do what you'll do. But, you
7 know, you file something, the defendants will have an
8 opportunity to respond.

9 And then one of the things I would say is -- and I do
10 this frequently -- should I merge the hearing on the motion for
11 preliminary injunction with the trial on the merits? If you do
12 expedited discovery in this case, how quickly can you do it?
13 Because you know that Twitter argues there's irreparable harm,
14 that if they are required to give Dr. Shiva his account back,
15 they're being compelled to speak. But I appreciate your
16 telling me you're thinking about a possible motion for
17 preliminary injunction, and I'm telling you that that will be
18 one of my questions.

19 MR. COOPER: I guess the last point, Your Honor, is I
20 do fully understand the implications of the court's tentative
21 view about filing the complaint, dealing with it on a 12(b) (6)
22 motion, and discovery being potentially inextricably
23 intertwined thereafter.

24 It is unclear to me, and the fault is mine, because I
25 didn't raise it when I was conferring with defendant's counsel

1 and for that matter Twitter's counsel, whether the procedural
2 mechanism here is that the defendants are assenting to our
3 motion to file a second amended complaint and intend to refile
4 their motions to dismiss or whether we should be moving to
5 further amend.

6 THE COURT: That's a question that I intended to raise
7 more explicitly. My preference would be, I think, to allow the
8 motion to amend and then deal with futility on a motion to
9 dismiss. I think if we're only talking about the Galvin
10 defendants, that would be relatively straightforward. I think
11 you're going to hear from Twitter that they want to oppose the
12 motion to amend because they don't want to be made parties to
13 this case for any purpose. But we'll hear from them.

14 But I do -- I haven't thought any of this all the way
15 through, but this last point we didn't discuss last month, and
16 it's not well developed in the record. I think there's first a
17 question is Twitter a necessary party. And your goal -- and
18 there is the relief I expect to see in the second amended
19 complaint -- Dr. Shiva wants his account back. It's Twitter
20 that would have to reactivate his account. So, you know, in
21 their defenses, they're not the government -- they're not
22 Galvin's puppets. They don't care what he says. They're not
23 going to do it. They are independent. So they may need to be
24 parties.

25 Then there's a question of whether they're

1 indispensable parties. They might be necessary but not
2 indispensable because if to prevail against Galvin you would
3 have to prove that Twitter was acting in concert with him,
4 there was sufficiently close collaboration, then an injunction
5 could be ordered to run against -- you know, would be ordered
6 in standard language to run against defendant and other persons
7 who were in active concert, participation with them,
8 essentially, Rule 65(d)(2).

9 And then Twitter, if they hadn't participated as a
10 party up to that point, would want to come in and say we never
11 acted in concert. So then we're sort of litigating that issue
12 in the context of what's the scope of the permanent injunction
13 or preliminary injunction that you persuaded me was
14 appropriate, if you do. This is still a very big "if." But
15 just to go through this, Twitter -- let's say Twitter is found
16 to be a necessary and indispensable party. Let's also say that
17 Twitter's forum selection clause is ordinarily enforceable, as
18 some other judges have found, they've told me. I don't know on
19 what kind of record they found that. But let's say it's
20 ordinarily enforceable. So a case against Twitter would have
21 to be in California. Then you might bring a motion to transfer
22 the case to Massachusetts, which the judge in California might
23 find to be -- or might not, but might find to be persuasive.
24 This is a case in which Massachusetts has a deep interest.
25 It's against the Secretary of the State of Massachusetts. And

1 Galvin might very well argue that he can't be sued in
2 California. "I didn't do anything in California."

3 And then the dilemma would be, or the issue might be,
4 you have one case in Massachusetts against Galvin and another
5 case in California against Twitter, if it's not transferred
6 here under the conventional considerations, and neither -- and
7 relief can't be afforded in either case, effective relief,
8 because it doesn't have all the necessary parties, and there
9 is, as I understand it, an interest of justice exception to
10 dismissing when an indispensable party can't otherwise be
11 joined. So you would argue that it's in the interests of
12 administration of justice to give Dr. Shiva his day in court
13 and you should join Twitter, and if we have to sue Twitter in
14 California, we're going to file a motion to transfer at the
15 same time. But that's one of the things I want you to brief
16 when you file your second amended complaint, so, you know, the
17 other parties can see it.

18 Let me take a look at something. And all of these are
19 "ifs." These are questions. For example, the First Circuit
20 has said in doing I think the analysis of whether a case should
21 be dismissed because a necessary party can't be joined, the
22 court may take into account other considerations -- well, I
23 don't think this is an applicable case. But in any event,
24 there are cases that indicate that if ordinarily a party
25 wouldn't be joined in this case, perhaps because of the forum

1 selection clause, failure to join would deprive that party of
2 his day in court anywhere, then the party he's seeking to join
3 can be joined. But my -- that's what I'd like the adversary
4 process to further educate me on.

5 What would the Galvin defendants like to say with
6 regard to my tentative views on how to proceed and the colloquy
7 I just had with Mr. Cooper?

8 MR. HORNSTINE: Thank you, Your Honor. This is Adam
9 Hornstine again on behalf of the Commonwealth defendants.

10 With respect to discovery, the Commonwealth defendants
11 would agree with Your Honor's tentative view that at this
12 juncture it is premature unless and until we see a new
13 complaint, and unless and until it's necessary to do so. We're
14 not going to do essentially precomplaint discovery or discovery
15 in search of jurisdiction, and I think Your Honor correctly
16 forecast that the Commonwealth defendants' preference for
17 addressing the new second amended complaint would likely be to
18 deal with it on a motion to dismiss, not as an opposition to a
19 motion to amend, though inasmuch as plaintiff's counsel has not
20 yet indicated what the claims are in suit, let alone who the
21 claims would be against, it's a little bit difficult for me to
22 express that view with any certainty.

23 THE COURT: Let me pause you here, because I should
24 also order you today to continue talking.

25 Mr. Cooper made explicit something that I inferred,

1 and that is, for example -- I didn't give a lot of time for
2 them to talk to their client, to talk to you to see what to do.
3 And they have to work closely with Dr. Shiva, who, of course,
4 is personally deeply invested in this case, and discuss things.
5 But I think, as they talk -- I think that there's perhaps a
6 reasonable prospect that if they talk long enough, you know,
7 fully enough with Dr. Shiva and explain qualified immunity --
8 it depends on the clarity of federal law, not Massachusetts
9 law -- and look into what I think at the moment are the
10 standards for holding Ms. Cohen personally liable, she's not
11 already protected by qualified immunity, but there's a
12 reasonable likelihood you won't see those in the second -- you
13 know, in the next complaint.

14 So, you know, if you talk about all these issues, look
15 at the cases, you know, figure out what really should be fought
16 over and what doesn't need to be, I think some of this may get
17 narrowed. They'll be plenty of space for intense litigation,
18 but it won't be as diffuse.

19 But I'm sorry, you're being very helpful, so go ahead.

20 MR. HORNSTINE: Your Honor, I agree that before
21 plaintiff's counsel files any new amended complaint, a meet and
22 confer would certainly be useful. During our last conference I
23 urged them, as Your Honor just did, to strongly consider
24 dismissing the claims on what Your Honor previously termed "the
25 human being defendants." Obviously, as we set forth in our

1 status report, those human beings have an interest in having
2 the litigation cloud removed from their head, particularly if
3 they are, as Your Honor has tentatively observed, entitled to
4 dismissal either on the basis of qualified immunity or another
5 basis. So I know that they are eager to do that.

6 THE COURT: And I understand that. I think any time a
7 person is sued individually, whether they're indemnified or
8 not, you know, their livelihoods are at stake, their funds are
9 at stake. You know, it's a big thing. And it's the
10 jurisprudence both on qualified immunity and, as you said,
11 under the 11th Amendment, the defense is against having to
12 litigate. So they need to be decided early on, except in the
13 11th Amendment area sometimes it can't.

14 But whatever it is, I take that -- I take your point
15 on the liability of the individual defendants, and I thought,
16 and Mr. Cooper has signaled what I expected, that it's possible
17 you won't see those claims in the next complaint, and then
18 there won't be any litigation over it here. There won't be any
19 appeals. So just keep talking.

20 MR. HORNSTINE: Yes, of course, Your Honor. I'm
21 optimistic that that will be the result of the new amended
22 complaint, though I will caution that when we were having
23 discussions with opposing counsel before, they did indicate
24 that they may want to do jurisdictional discovery on the
25 qualified immunity issue as well, but, again, I remain

1 optimistic.

2 THE COURT: To overcome qualified immunity, as I
3 understand it -- I haven't done this in a while -- the
4 allegations in the complaint would have to be sufficiently
5 specific that if they were proven -- you know, they'd have to
6 be plausible allegations which, if proven, would constitute a
7 violation of clearly established federal law at the time of the
8 conduct in question, and I dealt with *Plumhoff* very intensely
9 the year it came out because it was a case where a police
10 officer shot and killed somebody. And my memory of *Plumhoff* is
11 you basically needed a case with exactly the same facts decided
12 by the Supreme Court or the First Circuit before the conduct in
13 question. And, you know, this is -- as I understand it, this
14 particular case, the case Dr. Shiva brought, is somewhat a
15 novel case. I don't think anybody cited to me another case
16 where Twitter has been found to be a state actor, Facebook has
17 been found to be a state actor. So if it's a case of first
18 impression, at least in the First Circuit, as I understand it,
19 defendants are going to have qualified immunity.

20 MR. HORNSTINE: So yes, with that as a backdrop, Your
21 Honor, again, I will heed the court's admonition to continue to
22 meet and confer with Mr. Cooper about the potential amendment.

23 At the end of the day I think both this court and my
24 clients, their interests are jointly served by having one
25 complaint, a single unified briefing on motions to dismiss so

1 that the court can decide it. And I think that that's perhaps
2 the most direct way forward here. Let's have a clean
3 complaint. Let's have clean motions to dismiss. Let's get
4 decisions on them and see where things are at that point, you
5 know, both in this case and in plaintiff's other case that is
6 pending before this session of the district court.

7 THE COURT: Yeah, I haven't looked at that one in a
8 long time.

9 MR. HORNSTINE: Neither here nor there, but my
10 clients' interest is in let's get one complaint with one set of
11 allegations, one set of legal issues. Let's tee them up for
12 the court. Let's get them decided, and then we can figure out
13 how to go from there, whether it's discovery, whether it's
14 something else. We can figure it out.

15 THE COURT: Let me say the following: I think your
16 clients have other interests, because they're office holders.
17 If they have qualified immunity because this is a novel case or
18 an unusual case, not with a long line of precedent, they have
19 an interest in performing lawfully. I think, you know, when
20 they complained to Twitter and prompted NASED to complain to
21 Twitter, I doubt it will be proven they thought they were doing
22 anything impermissible. You know, we're in an environment
23 where there is considerable concern about misinformation
24 injuring the integrity of elections.

25 But, you know, in this case if money's not at stake,

1 you know, what's going to come out of this if -- and it's just
2 an "if" -- if the plaintiff prevails is guidance on what's
3 permissible and what isn't permissible, and you might get
4 guidance from a higher court if you don't prevail. You might
5 get guidance from a higher court if you do prevail. But, you
6 know, your clients I think have an interest, and I expect
7 they'll take it seriously, and, you know, perform lawfully. If
8 the law needs to be clarified or gets clarified, then I expect
9 they'll follow it.

10 If we get to the end of the case, because it's
11 happened in other cases, and -- I don't issue an injunction
12 against the government unless it's necessary. This is the
13 jurisprudence of *Farmer v. Brennan*, among others. So if we get
14 to the end of this ever and somehow the plaintiffs have
15 prevailed, you know, if Secretary Galvin tells me, "I don't
16 have to issue an injunction to order them to do whatever,"
17 he'll do it. Then there won't be any injunction, and he won't
18 face the threat of contempt. It will be in effect a
19 declaratory judgment. If there has to be an injunction and
20 then it's not obeyed, there's potentially serious consequences,
21 but we're a very long way from talking about that, I mean from
22 having -- I'm a long way from having to decide whether or not
23 to issue an injunction.

24 MR. HORNSTINE: Yes, Your Honor. And I think that is
25 essentially the Commonwealth defendants' response to your

1 colloquy with Mr. Cooper. If the court has any questions, I'd
2 certainly be happy to address them. Otherwise, I'm happy to go
3 back on mute.

4 THE COURT: Well, let me ask you this: I said that
5 I'd like to have a hearing in late August for a combination of
6 reasons, not only because I'll soon after lose my law clerk
7 who's immersed in this with me, but I hope to not be around --
8 I hope to be traveling internationally in the coming year more
9 than I have in the last year and a half. And this is a very
10 important case, and it's not the only case I have. You know,
11 we've got a backlog of trials and things.

12 But I want to always be reasonable. And you haven't
13 seen the amended complaint yet, but it may get slimmed down,
14 and I think the issues are crystalizing, I hope.

15 Do you expect the usual two weeks will be sufficient
16 for you to file your motion to dismiss?

17 MR. HORNSTINE: Again, it's challenging to agree to a
18 calendar without the benefit of knowing what claims are in the
19 suit, but if we get, as Your Honor terms it, a slimmed-down
20 complaint, I think that the Commonwealth defendants can put
21 together a motion to dismiss in two weeks' time, though I'm
22 mindful that, of course, Mr. Cooper will want his customary two
23 weeks to respond to any motion to dismiss.

24 THE COURT: Yeah. I think I'd probably give him less.
25 Whatever it is -- I'd asked you if you expect you could do it.

1 MR. HORNSTINE: I --

2 THE COURT: You have to see it.

3 MR. HORNSTINE: Right. I expect, Your Honor, that if
4 the complaint looks like something I hope it will look like,
5 that yes, the Commonwealth defendants likely can move to
6 dismiss it within two weeks. Again, I'm hopeful that
7 Mr. Cooper, before he hits go on a proposed second amended
8 complaint, will continue to meet and confer with us because
9 that may allow us to home in on that time frame.

10 THE COURT: Right. Well, you know it's coming
11 informally.

12 Mr. Cooper, do you have any concern about continuing
13 those conversations after you've talked to your client and have
14 something to further discuss?

15 MR. COOPER: I have no concern about talking to any
16 lawyer that wants to talk to me about how to streamline a case.

17 Let me just say I've never had anyone object to
18 narrowing claims. So that would be a first for me.

19 THE COURT: No, they're not going to object to
20 narrowing the claims. But if they know -- you know, they can
21 be working on some of the issues I've raised and who knows what
22 else.

23 MR. HORNSTINE: Your Honor, I will mention, just if
24 we're talking about scheduling for a potential hearing in
25 August, I do know that August 19 and 20 are certain NASED

1 conference days, and as well I will mention that both
2 Ms. Sterman and I are responsible for handling certification
3 for Article 48 petitions, initiative petition process, and that
4 process plays out during the month of August. We'd obviously
5 work to accommodate the court's schedule in that month, but
6 there may be some pockets where our availability is dicey that
7 month.

8 THE COURT: Well, you had asked me to accommodate your
9 schedule. I assume you'll be here if I schedule a hearing,
10 somebody will be here for Mr. Galvin if he wants to be heard,
11 if he wants to be represented. But this is what I want to --

12 MR. HORNSTINE: I hope that's helpful.

13 THE COURT: It's very helpful.

14 Let me say something that hopefully will be helpful to
15 you when you renew your pleadings, because I did, of course,
16 read what you wrote about the motion to dismiss, and you
17 repeatedly said the only thing that the Galvin defendants did
18 is make one complaint early in September and then NASED, on
19 September 25, complained about three more tweets. In my
20 current -- I think the testimony I've heard is that Ms. Cohen
21 talked to Ms. Tassinari or Ms. Tassinari alerted Ms. Cohen to
22 the tweets and that's why Ms. Cohen for NASED, as I understand,
23 complained to Twitter.

24 So in my current conception, the Galvin defendants are
25 not only responsible for what they did individually, but what

1 NASED did I think in conjunction with them. So your arguments
2 will be more promising if you recognize that's my present state
3 of mind.

4 MR. HORNSTINE: Understood, Your Honor. But, of
5 course, this is all premised on whatever we see in the new
6 complaint.

7 THE COURT: Yes, okay.

8 MR. HORNSTINE: But thank you for your guidance, Your
9 Honor.

10 THE COURT: Okay. Go ahead. And what shall I hear
11 from Twitter?

12 MS. ELLSWORTH: Your Honor, did you want to hear from
13 the NASED defendants as well?

14 THE COURT: Thank you, I do. You're right. What
15 should I hear from NASED?

16 MR. MITCHELL: Thank you, Your Honor. Nolan Mitchell
17 for NASED and Ms. Cohen. I will not take up a lot of your
18 time. I think that our positions are largely aligned with
19 those of the state here. What we're seeking is a quick way to
20 tee up the issues quickly, get them dismissed. We are
21 certainly more than happy to confer with the plaintiff and
22 Mr. Cooper about this and to explore ways to narrow this. And
23 I think we agree that discovery is inappropriate at this point
24 given all of the moving pieces and questions. Unless you have
25 particular questions, you know, I think our positions are

1 largely aligned.

2 THE COURT: Thank you. All right.

3 Now, what should I hear from Twitter?

4 MS. ELLSWORTH: Thank you, Your Honor. Felicia
5 Ellsworth for Twitter. You correctly predicted that, unlike
6 the defendants in the suit, Twitter is not inclined to forgo
7 the motion to amend process. We do think the forum selection
8 clause, as well as the joinder issues and Rule 19 issues, are
9 important and need to be decided. I do not have a strong view
10 on how we try and organization ourselves such that the briefing
11 can be done in an organized fashion and on a schedule that
12 works for everybody and kind of coincides with what the actual
13 defendants will be doing. It's really a procedural issue, and
14 we need to preserve that point. The arguments we are making
15 are largely what they would be if they were teed up in a
16 12(b) (6).

17 THE COURT: And I think because we didn't discuss this
18 much last time, in my own -- and haven't delved as deeply into
19 this as I have, for example, the 11th Amendment issue, but
20 what do you -- and now Mr. Cooper and his colleagues have to
21 catch up, and they can read the transcript, but what do you see
22 are the major questions that need to be decided with regard to
23 Twitter and in what framework?

24 MS. ELLSWORTH: I think the -- well, with the caveat
25 that, as Mr. Hornstine offered, we don't actually know and

1 Mr. Cooper was unable to tell us, and I understand why. He's
2 still figuring out what claims he can possibly make, whether we
3 will, in fact, be named as a defendant. Partly because that
4 has not yet been made clear, we have less of a say in all this
5 than anybody else, are we named a defendant in this court or
6 are we named a defendant at all.

7 But if this proposed revised second amended complaint
8 were to name Twitter as a defendant, we have a variety of
9 important, I think, arguments that need to be teed up. There
10 is, of course, the forum selection clause argument about where
11 any suit against us should be brought. There's an important
12 First Amendment argument about the nature of the relief being
13 sought and the nature of the claims being made here that we
14 want and need the opportunity to be -- to brief and argue. We
15 also have --

16 THE COURT: Just to see if I understand it, is that
17 the argument that being ordered to restore Dr. Shiva's account
18 would be compelled speech in violation of the First Amendment?

19 MS. ELLSWORTH: Precisely. That's exactly what it
20 would be. A similar argument is a Section 230 --

21 THE COURT: Could you explain that to me. Well, I
22 think I understand compelled speech is the basis on which the
23 Supreme Court agreed with me 9 to nothing on the St. Patrick's
24 Day Parade case, although that vehicle wasn't available to me
25 in my decision.

1 But what's the compelled speech issue?

2 MS. ELLSWORTH: So the First Amendment protects both
3 speech and the right not to speak. This is exactly the parade
4 issue, Your Honor, among others. And action taken by Twitter
5 choosing not to allow certain individuals to use its platform
6 is Twitter's First Amendment exercise of its right not to speak
7 or not to have that speech on its platform.

8 THE COURT: And are there -- this is not a rhetorical
9 question. Are there cases where court orders have been deemed
10 to be compelled speech in violation of the First Amendment?

11 MS. ELLSWORTH: There are. I don't have any of them
12 at my fingertips, but it would be this court's action that
13 would be the government action compelling the speech is the
14 action that I think Your Honor --

15 THE COURT: Right. But, I mean, if it's action -- it
16 would only be an order if there was a finding that Twitter's
17 conduct was fairly attributable to the government and violated
18 the First Amendment. So it would be a remedy. It just -- it
19 just -- it's a question that comes to my mind. But anyway, go
20 ahead.

21 MS. ELLSWORTH: Your Honor, I think we addressed this
22 a little bit back at the May hearings, which is that even if
23 those findings were to be made, there still would be First
24 Amendment issues on both sides that would need to be balanced.
25 So even if Twitter were found to somehow be engaged in some

1 form of state action, which we don't think it could be, but
2 even assuming that, Twitter's First Amendment right remains,
3 and that's an important issue that would need to be decided.

4 We also have our Section 230 Communications Decency
5 Act argument, which we had briefly addressed in our opposition.

6 THE COURT: Why don't you articulate that argument
7 again, please.

8 MS. ELLSWORTH: Your Honor, with your permission I
9 would ask if I could have Mr. Holtzblatt take that argument for
10 us.

11 THE COURT: Thank you for asking this time. That
12 would be fine.

13 MS. ELLSWORTH: All right. Mr. Holtzblatt will take
14 that one.

15 MR. HOLTZBLATT: Yes, Your Honor. The question under
16 Section 230 is whether the claim of the plaintiff is seeking to
17 treat Twitter as the publisher or speaker of third-party
18 speech. And there are a series of -- that's under Section
19 230(c)(1) of the Communications Decency Act.

20 THE COURT: And what is the language? I know part of
21 230 says good faith, but does it have to be independent and in
22 good faith?

23 MR. HOLTZBLATT: So, Your Honor, there are several
24 separate immunities under Section 230, including under Section
25 230, Subsection (c). The provision that I believe Your Honor

1 had quoted at the prior hearing is 230(c)(2) at paragraph (A),
2 and it's 47 U.S.C. 230(c)(2)(A) that refers to good faith, and
3 that the action be voluntarily taken, which I think is --

4 THE COURT: That's it. Voluntarily taken and in good
5 faith. So you have --

6 MR. HOLTZBLATT: I'm sorry.

7 THE COURT: I'm sorry. Go ahead.

8 MR. HOLTZBLATT: There is a separate subsection of
9 230, which is 47 U.S.C. Section 230(c)(1) --

10 THE COURT: Are you finding it?

11 MR. HOLTZBLATT: Oh, I'm sorry, Your Honor. I have
12 it, yes.

13 THE COURT: Okay. Go ahead. I found my materials on
14 Section 230(c)(2)(A), and it just -- again, to give all of you
15 the benefit of my really tentative thinking, I thought with
16 regard to this provision that provides immunity for Twitter for
17 any action voluntarily taken in good faith, the issue would be
18 closely related to the merits of the case. Was Twitter acting
19 voluntarily, or was it coerced? And even if it was voluntary,
20 was it in good faith? Was it -- and then somebody would have
21 to educate me on what good faith means in this context. But if
22 it was in collaboration -- sufficiently close collaboration
23 with the government that it could fairly be deemed state
24 action, and everybody knows that the government can't censor
25 speech, particularly political speech, is that good faith?

1 Those would be my questions.

2 MR. HOLTZBLATT: Yes, Your Honor. Your Honor, there
3 is no good faith or voluntariness requirement of the other
4 provision of Section 230 that we are relying on at the
5 threshold.

6 THE COURT: What's the other one?

7 MR. HOLTZBLATT: Section 230(c)(1) of Section 230. So
8 the language of Section 230(c)(1) simply states "No provider or
9 user of an interactive computer service shall be treated as the
10 publisher or speaker of any information provided by another
11 information content provider." And a number of courts -- and
12 I'll cite one for Your Honor, the Ninth Circuit in the *Riggs v.*
13 *Myspace* case, which is cited in our opposition to the motion to
14 amend, that's 44 Federal Appendix 986 at 987, applied
15 subsection(c)(1), not subsection (c)(2)(A), to hold that
16 Section 230, quote, "immunizes decisions to delete user
17 profiles," which is similar to the claim in this case that
18 Twitter allegedly is alleged to have acted unlawfully by
19 suspending the plaintiff's account.

20 So Twitter at this threshold -- there may be other
21 defenses that Twitter would assert at later stages of the case,
22 but at the pleadings stage, and courts all across the country
23 in many cases have held that Section 230(c)(1) is appropriate
24 and, in fact, should be decided on the pleadings before there
25 is any discovery because it's an immunity, it's a protection

1 from the burdens of litigation, not only --

2 THE COURT: Can you read me that language again,
3 because I don't have that at my fingertips.

4 MR. HOLTZBLATT: The Riggs?

5 THE COURT: (c) (1).

6 MR. HOLTZBLATT: Yes, Your Honor. "No provider or
7 user of an interactive computer service shall be treated as the
8 publisher or speaker of any information provided by another
9 information content provider."

10 THE COURT: This is really off the top of my head,
11 but, again, it's sort of a preview of coming attractions. If
12 and when you reiterate that argument, perhaps amplify it, I'm
13 going to ask, "Isn't that a protection against suits for
14 defamation?"

15 MR. COOPER: I'd say --

16 THE COURT: In other words, if --

17 Mr. Holtzblatt, say something so I see you instead of
18 Mr. Cooper.

19 MR. HOLTZBLATT: Yes, Your Honor. That argument has
20 been made and has been repeatedly rejected by courts across the
21 country.

22 THE COURT: Well, I'd be interested in the reasoning
23 because it immediately -- and whatever my immediate reaction is
24 doesn't mean it will be my final answer if I have to answer it,
25 but it sounds as if that's intended to say that if Dr. Shiva

1 is using his Twitter account, when he had one, and engages in
2 defamation or libel Twitter's not responsible for that. In
3 fact -- I have only the most primitive understanding of all of
4 this. But, I mean, it seems to me that if Twitter in this case
5 argues it's not a publisher, it can't be held liable for
6 defamation because it's not the speaker, then how is its speech
7 implicated? It's just a question. And I know when you and
8 your colleagues put your great minds to it you'll have
9 responses to the question. So will Mr. Cooper.

10 But anyway -- keep going on this if you wish.

11 MR. HOLTZBLATT: Yes, Your Honor. What courts,
12 including the *Riggs* case that I cited for you and many others
13 have found, and I'll give you another citation, which is a very
14 recent California Court of Appeal decision, *Murphy v. Twitter*,
15 which was 60 Cal.App.5th 12 at pin cite 31, what the courts
16 have held is that this (c)(1) provision protects against claims
17 that seek to treat the provider of interactive computer service
18 as a publisher.

19 In other words, they seek to impose liability for
20 quote publishing conduct, and publishing conduct includes both
21 the decision to publish but also the decision not to publish,
22 much like in the First Amendment context the protection of free
23 speech includes both the protection against being prevented
24 from speaking and also the protection from being compelled to
25 speak. It's the two sides of the same coin. So the (c)(1)

1 protection, which is a protection for the provider's publishing
2 conduct, likewise includes a decision to publish and a decision
3 not to publish.

4 THE COURT: I mean, it is absolutely intriguing to me,
5 and I haven't dealt with this in 26 years, litigated it, but
6 when -- you know, when the organizers of a private parade are
7 required to include somebody with a sign with a message they
8 find objectionable, I understand that muddles their own
9 message, and is an impermissible form of compelled speech. But
10 it seems to me that it's Twitter's position that it's not a
11 speaker at all. It's just like a megaphone for, in this case,
12 Dr. Shiva. So I'll read those cases with great interest and I
13 know you'll develop the argument very well. But it doesn't
14 immediately strike me as right.

15 MR. HOLTZBLATT: Your Honor, I think in this respect
16 the First Amendment protection and the Section 230 protection
17 are in some respects protecting the same right of Twitter. And
18 that right, Your Honor -- Twitter has an incredibly strong
19 interest as a communications platform in what kind of speech is
20 assembled on that platform and what kind of speech it
21 disseminates through that platform in the same way that a
22 parade organizer who's assembling multitudinous voices has a
23 strong interest. So Twitter here has made a protected decision
24 that it does not want certain types of misinformation speech.
25 And that is an expressive decision by --

1 THE COURT: And you just added a word that, again, you
2 know, is the thread that goes through all this "protected."
3 Because -- I don't -- I think I understand; I don't think
4 anybody's arguing to the contrary -- that if Twitter is acting
5 independently as a private organization, not having been
6 coerced or closely collaborated with the government, then it
7 can make those decisions. There's no -- the First Amendment's
8 not implicated because it's not the government. So when you
9 say "protected" -- maybe you mean protected by the statute, as
10 well as not protected by the First Amendment. But in any
11 event, this is useful because it plants a seed with me, and
12 it's something that the plaintiff can perceive he's going to
13 have to litigate, but it does seem somewhat anomalous to me at
14 the moment. Anyway. But that's -- I hadn't thought about
15 (c) (1), but you know you may want to remind me of what you've
16 done or do even more work on it, but I have no answer.

17 MR. COOPER: Your Honor, may I have the floor for a
18 second?

19 THE COURT: Yes.

20 MR. COOPER: Thank you, Your Honor. I very much
21 appreciate hearing Twitter 's thinking and I will keep it in
22 mind, of course. The protections of the Communications Decency
23 Act for Twitter end where government action begins, and I think
24 it inexorably leads back to the fundamental question we're
25 going to have to address here. I have an even more basic

1 question, which is I think I hear Twitter suggesting
2 procedurally that vis-a-vis it we should be required to move to
3 amend, and it will somehow have standing to enter the case for
4 purposes of opposing as opposed to us amending, asking my
5 fellow brother and sister to accept service of the complaint,
6 and then getting their motion to dismiss based upon forum
7 selection.

8 THE COURT: You know, that's actually -- look, I know
9 we're taking a long time for a scheduling conference, but this
10 is what I'd like to flesh out. You just said something that I
11 think occurred to me months ago but it hadn't been raised since
12 and I've overlooked. I suppose if it's a motion to amend, then
13 if Twitter is not in the case, unless I exercise my discretion
14 to hear from them, they don't have the discretion to be
15 heard -- they don't have a right to be heard. They don't have
16 standing. Right?

17 MR. COOPER: Exactly, Your Honor. I think the most
18 efficient way to proceed, it sounds like the current defendants
19 agree with this, is that we would file the second amended
20 complaint. We would get it to Twitter. Presumably they would
21 accept service of it. They will file a motion to dismiss in
22 response on whatever grounds they deem appropriate.

23 THE COURT: Would you agree that they could argue, if
24 that procedural course was taken, that they're not a necessary
25 party, they're not -- they shouldn't be permissively joined?

1 In other words --

2 MR. COOPER: I would agree that they reserve all of
3 their arguments, Your Honor.

4 THE COURT: Okay.

5 MR. COOPER: Just as they want one second amended
6 complaint so they know what we're dealing were, we would like
7 one set of motions to dismiss. We know what we need to --

8 THE COURT: And they could argue that I should either
9 dismiss the case against them under the forum selection clause
10 or transfer the case to the Northern District of California.

11 MR. COOPER: Exactly, Your Honor. And I don't mean to
12 be suggesting that we've made a final decision to name Twitter
13 as a defendant.

14 THE COURT: Okay. Oh, that's useful for me to hear
15 too. Apparently there are others who were interested.

16 MR. COOPER: I will add, Your Honor --

17 THE COURT: I'm not ordering you to name them. I just
18 have these pro se pleadings where the goal was to get --
19 Dr. Shiva's goal I knew was to get his Twitter account back,
20 and he was asking me to order the defendants to ask Twitter to
21 give it back, and it's foreseeable that Twitter would say, you
22 know, we don't take direction from you, and no, unless they
23 change their mind about Dr. Shiva. So all right, you know, I
24 just wanted lawyers on both sides of this. And I trust
25 Dr. Shiva understands that his interests are being represented

1 very well, as everybody else's interests are being represented.

2 MR. COOPER: I will add, Your Honor, yes, we are
3 fundamentally in laser-like concern with Dr. Shiva, and what we
4 contend is there's improper restraint on speech that's ongoing.

5 THE COURT: I understand that. Let me go back to
6 Ms. Ellsworth, because -- now she's heard a little more about
7 this. But I do have these questions about necessary parties,
8 indispensable parties, permissive joinder, Dr. Shiva having no
9 day in court.

10 MS. ELLSWORTH: Right.

11 THE COURT: That argument.

12 MS. ELLSWORTH: All those arguments we will raise on
13 the merits and whatever the right posture is.

14 I point the court to Local Rule 15.1, which says that
15 when a party is sought to be added to a case, service needs to
16 be effected pursuant to the usual service requirements of Rule
17 5. And from service flows all the rights to oppose whatever
18 paper is served on you.

19 I think we have standing and the ability -- and this
20 is what the court had ordered back in April or March, which was
21 that Dr. Shiva was to serve a complaint naming, if he wanted --

22 THE COURT: Right, and actually I think at that time I
23 had the local rule in mind. I appreciate being reminded of it.
24 Regardless, in some fashion I want to hear from you on these
25 issues. You know, so one of the things I'm ordering you to

1 confer about is -- and maybe I'll have you all report again in
2 a week or something, is, you know, what's your position on
3 whether they can just file the amended complaint preserving all
4 of Twitter's arguments, they can do it -- you know, raise them
5 on a motion to dismiss. There may not be much of a functional
6 difference because if I allowed them to amend after having
7 heard all the arguments, I'm going to deny a motion to dismiss
8 unless you argue something you couldn't have argued previously.

9 But what -- why is Twitter not a necessary party --
10 why is Twitter not a necessary party?

11 MS. ELLSWORTH: Well, under the -- the way that we had
12 looked at the Rule 19 analysis previously was looking, as the
13 cases dictate, at the actual extant pleading, which sought
14 relief that could be sought and only from the state government
15 and was not necessary to join Twitter.

16 Now, the relief that Dr. Shiva sought in his pro se
17 second amended complaint did seek reinstatement of his account,
18 but that's not what the court looks at under this Rule 19
19 analysis. Right? The court looks at the existing pleadings to
20 determine whether the relief can be brought or the relief can
21 be --

22 THE COURT: What I would be looking at is Mr. Cooper's
23 complaint when we get back to this. So you've got, you know,
24 lawyers on the other side who, you know, will draft a complaint
25 in familiar form, I assume, and they'll say you're seeking

1 relief from Twitter, I've read the cases where ordinarily
2 private actors have been deemed to be state actors, and I
3 expect consistent with your obligations under Rule 11, there
4 will be allegations that this is such a case.

5 So do you expect -- you're not committed. You haven't
6 seen the document. But do you expect that you would argue that
7 Twitter's not a necessary party, or just that it can't be sued
8 here?

9 MS. ELLSWORTH: Well, Your Honor, answering in a
10 vacuum without knowing what's going to be claimed, I still
11 think the calculus is the same because we still look at the
12 existing complaint to determine whether we are necessary to
13 that complaint. That's the way the analysis runs.

14 THE COURT: You mean Dr. Shiva's --

15 MS. ELLSWORTH: Correct.

16 THE COURT: Maybe that will persuade me to allow the
17 amendment and have you argue futility or, you know, lack of
18 jurisdiction in response -- in a motion to dismiss. Because
19 I'm -- look, this isn't a game, the First Amendment interest is
20 implicated you say on both sides. So if there's a permissible
21 way for me to sort of get to the merits of the immediate issue,
22 I'm going to do that. I don't want to spend any more time on
23 Dr. Shiva's complaint.

24 MS. ELLSWORTH: I understand, Your Honor. I do think
25 it's productive for the parties to continue to confer on this

1 and also on this question raised about whether we should be on
2 a motion to amend posture or some other posture, reserving all
3 rights that we would have had if we weren't in a motion to
4 amend posture. Obviously we need to confer with our client
5 about that, but we can certainly report back on that issue.

6 I won't belabor the point because I'm sure it's not
7 surprising to Your Honor. We, of course, are of a piece with
8 the actual defendants about the prematurity of any discovery at
9 this point. We have other, including both Section 230 and
10 First Amendment arguments against discovery over and above the
11 procedural issues of proceeding with discovery at this
12 juncture. I heard Your Honor to say that while Dr. Shiva's
13 counsel may be allowed to serve to the court some discovery so
14 everyone can look at what he's proposing to take, there won't
15 be any discovery that anybody --

16 THE COURT: I was somewhat ambiguous about that. I
17 believe I said I would require him to either describe the
18 discovery they'll be seeking or to propound it, but you
19 wouldn't be required to respond to it -- defendants wouldn't be
20 required to respond to it until I decide to dismiss -- you
21 know, whether or not to dismiss the case. If I dismiss the
22 case, there's no proper basis for discovery, of course, and no
23 need for it. If I don't, then --

24 But to me, as a practical matter, a significant issue
25 is whether or not Twitter is in the case before me in

1 Massachusetts. And, you know, I think you said last time,
2 well, we have the forum selection clause. Dr. Shiva read it.
3 He's an educated and intelligent man. He agreed to it. And
4 I'm not necessarily finding facts here, but other courts have
5 found it enforceable. There's nothing wrong with it. If he
6 wants relief from Twitter, he needs to sue us in the Northern
7 District of California.

8 And so if he sued you in the Northern District of
9 California, do you think he could sue Galvin there?

10 MS. ELLSWORTH: I think he can. I won't pretend to
11 speak for what arguments the secretary may have against that,
12 but certainly there is precedent for suing a state actor in a
13 different state.

14 THE COURT: How would it be personal jurisdiction?

15 MS. ELLSWORTH: Twitter has filed a suit against the
16 Attorney General of Texas in a California court, and personal
17 jurisdiction was found to exist there. So that's a pretty
18 recent example where personal jurisdiction was found against AG
19 Paxton.

20 THE COURT: On what facts?

21 MS. ELLSWORTH: That I'm not familiar with, Your
22 Honor.

23 THE COURT: I mean, look, it's -- again, this -- I
24 mean, I'm just trying to communicate my questions and they're
25 not as well thought out as some of the other things I've said

1 to you. But here's -- if Twitter's a necessary party, then you
2 argue they can't be -- Twitter can't be sued in Massachusetts
3 because of the forum selection clause. Assume I find that's
4 correct. Then there's a question as to whether Twitter is an
5 indispensable party, because if they are an indispensable party
6 that can't be sued here, I might be required to dismiss the
7 case unless there's an exception to that general rule. And I
8 think some of the jurisprudence recognizes an exception if it
9 wouldn't be in the interests of justice if there would --
10 basically the plaintiff would lose his day in court. There's
11 no place he can go to vindicate the alleged violation of his
12 First Amendment rights.

13 I'm just saying because this is something you all will
14 need to brief if and when we get to it. You know, if Twitter
15 argues, you know -- and as I said to you previously, I have
16 thought that if you were going to get sued anywhere -- well, or
17 if relief was going to be sought against Twitter, you might
18 want to be in this case so you have standing to argue all the
19 issues and to appeal any adverse decisions when they're ripe
20 for appeal, because maybe -- you know, maybe Mr. Cooper and
21 Dr. Shiva will decide not to -- I'm beginning to see why they
22 might not, because then -- let me just -- I'm just thinking out
23 loud.

24 Because if they don't sue you, they'll litigate
25 against Galvin and NASED probably -- well, NASED

1 hypothetically, and then I'll decide whether they stated a
2 plausible claim that Twitter's conduct is state action in
3 violation of the First Amendment. Let's say they get over that
4 hurdle. Then we litigate this whole case without Twitter
5 except that you're a third-party witness, and maybe they have
6 to get a subpoena for your deposition in northern California
7 and seek documents from you there. But you're not in the case.
8 I don't get to hear from you.

9 And then let's say hypothetically on summary judgment
10 I find or a trial jury finds a state action, and -- actually,
11 before I said if Galvin was going to comply, then I wouldn't
12 issue an injunction, but I might have to because that would be
13 the only way to possibly compel Twitter to do something. And I
14 would issue an injunction that said Galvin defendants and
15 everyone acting in active concert with them has to do what's
16 necessary to restore his Twitter account. And Dr. Shiva would
17 argue that Twitter -- you know, I found that Twitter was acting
18 in active concert with the Galvin defendants. And then, again,
19 I think without the participation of Twitter, I would have to
20 find if that was proven. If I found that Twitter was acting in
21 active concert with Galvin and was refusing to restore the
22 account, then we'd have contempt proceedings, which I think is
23 the line of cases that I was reading a month ago, was the way
24 that, you know, you might be able to challenge my decision.

25 So maybe -- I understand why Mr. Cooper and his

1 colleagues might prefer to litigate this case without you
2 unless and until they persuade me what they would need to
3 persuade me or a jury of. Very interesting. I guess I'll wait
4 and see what happens.

5 MS. ELLSWORTH: Let me just say a few brief things,
6 Your Honor.

7 The first is there is no reason why if Dr. Shiva
8 wanted to pursue claims against both Twitter and the state
9 defendants, the claims against Twitter can't proceed in the
10 Northern District of California pursuant to the forum selection
11 clause and the claims against NASED and the Galvin defendants
12 proceed here. That is feasible, permissible and required by
13 the existence of this forum selection clause.

14 THE COURT: If he sued you in California, could he
15 move to have the case transferred here?

16 MS. ELLSWORTH: I don't think a plaintiff can move to
17 transfer, but I haven't looked at that issue, but I've only
18 ever seen a 1404(a) brought by a defendant. So I don't know
19 that that would be possible.

20 THE COURT: Well, I don't --

21 MS. ELLSWORTH: And procedurally whether or not he
22 could seek it, of course the forum selection clause argument we
23 would make to a judge in the Northern District of California,
24 the same argument we're making to you.

25 THE COURT: Right. But if the tables were turned, and

1 I had the discretion, I would transfer the case and say that's
2 -- I don't know, I think there might be a strong case for
3 transfer. The witnesses are here. The documents are here.
4 This relates to the Massachusetts Secretary of State.
5 Massachusetts has a particularly acute interest in the case.

6 MS. ELLSWORTH: Your Honor, I'm looking at Section
7 1404. I don't see on the face of the statute the answer to
8 this question.

9 THE COURT: Well, it seems to have your question in
10 it. I don't think it's limited to defendants, but it has to be
11 a place where the civil action -- it says "For the convenience
12 of the parties and witnesses, in the interest of justice, a
13 district court may transfer any civil action to another
14 district or division where it might have been brought." I
15 thought that "might have been brought" is where there's
16 personal jurisdiction, not where it might have been brought but
17 for a forum selection clause. But look, it's just an issue.

18 MS. ELLSWORTH: Right. And we would, of course, argue
19 it could not be brought, cannot be brought here. The "might
20 have been brought" would not be satisfied.

21 Allow me to say that about this question of interests
22 of justice and day in court, because there's no reason why the
23 suits couldn't proceed separately, if Dr. Shiva was or counsel
24 decided they do want to proceed against Twitter.

25 As to your question about an injunction would somehow

1 bind us or a finding that Twitter were a state actor without
2 Twitter participating in the suit, we had a colloquy on this a
3 month ago. I don't think that specific finding that the court
4 was just sort of discussing would be available to the court in
5 a case in which we are not a party under Rule 19. So --

6 THE COURT: Oh -- I'm sorry. You finish. But that
7 doesn't sound right at all. We frequently have -- issue
8 injunctions, and they cover unnamed bankers and, you know,
9 agents. That's the reason for that provision.

10 MS. ELLSWORTH: No, I understand the Rule 65 argument,
11 Your Honor. But what I'm talking about is if the court were to
12 make a finding that Twitter is a state actor in this
13 circumstance, I think by necessity that would impair or impede
14 our interest under Rule 19(a)(1)(B)(1). So, again, the
15 question of the relief that's being sought in this complaint
16 that we will all see in the next several weeks will be
17 important to help crystalize the issues, but I don't -- I just
18 don't think the hypothetical the way Your Honor spun it out
19 could, in fact, occur consistent with the rules.

20 THE COURT: I don't even know how that -- well, we
21 would be -- this train would be far down the track before that
22 became an issue. Mr. Cooper would have persuaded me or a jury
23 that there's sufficiently close connection between the Galvin
24 defendants, which I referred to as including NASED, and
25 Twitter, that Twitter canceling his account was state action.

1 Then if necessary, I would issue an injunction that ran to the
2 defendants in this case and everyone acting in active concert
3 with them.

4 Then, you know, they would say, Judge, you've already
5 found that Twitter has been acting on a continuing basis in
6 active concert with the Galvin defendants. So Twitter's
7 covered. Clarify your ruling to include Twitter. So I might
8 do that. And then you would come in and say, "That's
9 impermissible. We were an indispensable party."

10 So if they decide not to sue Twitter, I think I would
11 understand why. It would simplify things for me, or it might
12 not. I just wanted you to know about it.

13 MS. ELLSWORTH: Well, I appreciate your raising it,
14 Your Honor.

15 THE COURT: Not just the issue. I thought Twitter
16 might want to participate in this case. But you all are very
17 well equipped to advise your clients, and they're well equipped
18 to understand your advice. So we really do need to go step by
19 step, but I think this discussion has been helpful to me at
20 least.

21 I told you what kind of schedule I was thinking about,
22 and do you expect you could meet that schedule?

23 MS. ELLSWORTH: I think we could, Your Honor, with the
24 same caveats offered by Mr. Hornstine with regard to what we
25 don't know. But I think we can also continue to meet and

1 confer with Mr. Cooper about whether we'll be a party to this
2 or not, and I don't know if the court had a particular set of
3 dates in August that it was looking at.

4 THE COURT: Not yet. And it's a little -- my
5 availability is a little uncertain but will get clarified
6 somewhat in the next few days. But it will probably, to be
7 safe, be the week of August 23, maybe the 24th and 25th. Is
8 that Saturday Labor Day?

9 MS. ELLSWORTH: No, Your Honor. Labor Day is late
10 this year. So it's the --

11 THE COURT: That's what I thought. I would say maybe
12 that week. And I actually want you all to tell me about
13 whether you have some relatively short vacations planned, at
14 least periods of time. I'll take that into account and be as
15 accommodating as I can.

16 But here's what I think I should do.

17 I'm sorry, Mr. Cooper, is there anything more you'd
18 like to say at this point?

19 MR. COOPER: There's a lot I could say, but I don't
20 think it would be productive.

21 THE COURT: All right. I'm ordering you all to order
22 the transcript of this hearing. I'm ordering you all to
23 continue to confer and report by June 24 on whether you've
24 reached agreement on anything, including but not limited to
25 whether I should address -- I'm going to -- my present

1 intention is to address the new claims against the Galvin
2 defendants on a motion to dismiss. You should tell me whether
3 Twitter wants to go that route without prejudice to anything it
4 wants to argue. And I might decide to do that anyway, if it's
5 a contested issue.

6 And then you should keep talking after the 24th. If
7 there are open issues, tell me what you're continuing to talk
8 about, please.

9 I'm ordering the plaintiff by July 15 to file a
10 revised second amended complaint, a description of the
11 discovery it will be seeking if the complaint survives the
12 motion to dismiss by the Galvin defendants at least, whether it
13 survives the motion to dismiss, and a memo on the issues that I
14 identified earlier.

15 I'm ordering the defendants and Twitter to respond to
16 that by July 30. And if the plaintiff wants to reply, to do
17 that by August 11.

18 Although this could change, I'm going to schedule
19 hearings in this case for August 25, 26 and 27. If there's
20 anything I can decide orally, I will. Otherwise, I'll take it
21 under advisement.

22 MR. COOPER: Your Honor, may I ask a question about
23 the court's order?

24 THE COURT: Yes.

25 MR. COOPER: I understood from the earlier part of our

1 discussion that you expect a memo consistent with Rule 11 if we
2 deem to pursue claims against the individual defendants both
3 with regard to qualified immunity and jurisdiction over
4 Ms. Cohen. I clearly understood that. Are you telling the
5 parties that the defendants' motions to dismiss are due on July
6 30?

7 THE COURT: Yes.

8 MR. COOPER: Responses due on August 11?

9 THE COURT: Yes.

10 MR. COOPER: Okay.

11 THE COURT: But your memo has to address more than
12 those two issues. I told you what I thought the standards, you
13 know -- the 11th Amendment issue, the motion to dismiss, you
14 know, do I do differential fact-finding under Rule 12(b) (6), or
15 are these -- are the merits intertwined with the jurisdictional
16 issue? So under the cases like *Valentin* and *Kerns*, do I deny
17 the motion to dismiss without prejudice to be reconsidered
18 after discovery on a motion for summary judgment, or if there
19 are materially disputed facts, at trial. I think those are the
20 four issues that I told you to brief.

21 MR. COOPER: I understand that, Your Honor. It would
22 just seem to me to make more logical sense for us to brief the
23 issue of needed discovery in particular in response to the
24 motion to dismiss.

25 THE COURT: Well, with regard -- I wasn't asking you

1 to brief the motion for discovery. I was -- I said I wanted
2 you to describe what -- and it could be without prejudice. It
3 could evolve -- but here. This was the way I was thinking
4 about it: So let's say we are having hearings in August. I
5 orally deny the motion to dismiss. Then you're going to want
6 to commence discovery. But then they're going to -- they may
7 object to some of the discovery. I'd like everybody to have
8 this information, so if I deny the motion to dismiss, discovery
9 can start promptly. That was the point.

10 MR. COOPER: Got it.

11 THE COURT: Is that okay?

12 MR. COOPER: Yes.

13 THE COURT: All right. Now I want all the lawyers and
14 Dr. Shiva and the NASED defendants -- all the lawyers and their
15 clients who are on this to go into the breakout room with me.

16 Is there anything else before court goes into recess?

17 MR. COOPER: No, Your Honor.

18 THE COURT: Okay. And nothing from the other parties,
19 evidently. So court is in recess. But I want to talk to
20 everybody privately, everybody who's participating in the case.

21 MR. HORNSTINE: Your Honor, while that's happening,
22 does the court wish for the human being clients I represent to
23 be in the breakout room as well?

24 THE COURT: Yes, I think it's a good idea, and I don't
25 think we'll be there too long. (Adjourned at 4:49 p.m.)

1 C E R T I F I C A T E
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3
4 UNITED STATES DISTRICT COURT)
5 DISTRICT OF MASSACHUSETTS)
6
7
8 I certify that the foregoing is a correct transcript
9 from the record of proceedings taken June 15, 2021 in the
10 above-entitled matter to the best of my skill and ability.
11
12
13
14
15 /s/ Kathleen Mullen Silva 6/22/21
16
17 Kathleen Mullen Silva, RPR, CRR Date
18 Official Court Reporter
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